

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA  
LAS VEGAS, NEVADA

In re: USA COMMERCIAL MORTGAGE ) JANUARY 31, 2007  
COMPANY, ) E-Filed: 03/18/07  
 )  
Debtor. ) Case No.  
 ) BK-S-06-10725-LBR  
 ) Chapter 11

PARTIAL TRANSCRIPT OF PROCEEDINGS  
OF

(06-10725) MOTION TO ENFORCE ORDER

GRANTING DEBTOR'S MOTION TO DISTRIBUTE FUNDS, 2350  
AND

AND

OMNIBUS OBJECTION TO CLAIM OF  
IN THE AMOUNT OF CLAIMS ON EQUITY  
MISFILED AS CREDITOR CLAIMS, NO. 2353

**EDITOR  
AND**

**OBJECTION TO CLAIM 79**

OBJECTION TO CLAIM 75  
OF PENSION BENEFIT GUARANTY CORPORATION  
IN THE AMOUNT OF \$884,389,

IN THE AMOUNT OF \$884,389.

CLAIM 80 OF PENSION BENEFIT GUARANTY CORPORATION  
IN THE AMOUNT OF 1,068,233.4

THE AMOUNT OF 1,068,233,4

15 AND CLAIM 81 OF PENSION BENEFIT GUARANTY CORPORATION,  
16 NO. 2252

NO. 2252

AND

## OBJECTION TO CLAIM 83

OF PENSION BENEFIT GUARANTY CORPORATION  
IN THE AMOUNT OF \$884,389,

IN THE AMOUNT OF \$884,389,

CLAIM 84 OF PENSION BENEFIT GUARANTY CORPORATION  
IN THE AMOUNT OF \$1,068,233,  
AND CLAIM 85 OF PENSION BENEFIT GUARANTY CORPORATION

IN THE AMOUNT OF \$1,068,233,

AND CLAIM 85 OF PENSION BENEFIT GUARANTY CORPORATION,  
NO. 2255  
AND

NO. 2255

AND

APPLICATION FOR COMPENSATION, NO. 2316

AND

22

23  
24

OMNIBUS OBJECTION TO CLAIM OF  
IN THE AMOUNT OF MISFILED  
AGAINST USA CAPITAL FIRST TRUST DEED FUND, LLC,  
BY DANIEL O. CARLTON & TAKEKO CARLTON REVOCABLE TRUST  
DATED 04/30/97, CLAIM NO. 43;  
DANIEL O. CARLTON & TAKEKO CARLTON REVOCABLE TRUST  
DATED 04/30/97, CLAIM NO. 44;  
DANIEL O. CARLTON & TAKEKO CARLTON REVOCABLE TRUST  
DATED 04/30/97, CLAIM NO. 45;  
DANIEL O. CARLTON & TAKEKO CARLTON REVOCABLE TRUST  
DATED 04/30/97, CLAIM NO. 46;  
DANIEL O. CARLTON & TAKEKO CARLTON REVOCABLE TRUST  
DATED 04/30/97, CLAIM NO. 49;  
LAWRENCE J. ARONSON & HENRIETTA ARONSON, CLAIM NO. 50;  
MOLLIE SHOICHER & HENRIETTA ARONSON, CLAIM NO. 51;  
BUCKWALD REVOCABLE TRUST DATED 02/11/92, CLAIM NO. 52;  
PHILLIP DARIN GOFORTH & FRANCESCA M. GOFORTH, CLAIM NO. 54;  
MELINDA ESTEVEZ & RICHARD DAVID ESTEVEZ,  
ACCT. NO. 2, CLAIM NO. 57;  
MELINDA ESTEVEZ & RICHARD DAVID ESTEVEZ,  
ACCT. NO. 1, CLAIM NO. 58;  
MELINDA ESTEVEZ & RICHARD DAVID ESTEVEZ,  
ACCT. NO. 3, CLAIM NO. 59;  
THE EVO E. ZEPPONI AND BILLIE D. ZEPPONI FAMILY TRUST  
UNDER AGREEMENT DATED 02/09/83, CLAIM NO. 60;  
IONA PETE BAKAS HALLIDAY, CLAIM NO. 61;  
LAUREN J. GILBERT & ERIN M. GILBERT, CLAIM NO. 62;  
LAUREN J. GILBERT, CLAIM NO. 63;  
MICHAEL W. CARLTON & HELEN I. CARLTON, CLAIM NO. 67;  
SONDRA SKIPWORTH REVOCABLE TRUST DATED 11/28/01,  
CLAIM NO. 74;  
DONNOLO FAMILY TRUST DATED 08/24/88,  
JOSEPH & LORETTA DONNOLO, TRUSTEES, CLAIM NO. 75;  
RICHARD L. YOUNGE IRA, CLAIM NO. 76;  
EDWIN C. HANSEN & RACHEL M. HANSEN, CLAIM NO. 78;  
CENTER STATE BEVERAGE, INC., CLAIM NO. 79;  
LAYNE FAMILY TRUST, BRUCE & SHERRY LAYNE, CLAIM NO. 81;  
KAREN PETERSEN TYNDALL TRUST DATED 03/09/94, CLAIM NO. 86;  
KPT IRREVOCABLE TRUST DATED 07/16/99, CLAIM NO. 87;  
KPT IRREVOCABLE TRUST DATED 07/16/99, CLAIM NO. 88;  
ROBERT CAROLLO AND BEVERLEY CAROLLO, CLAIM NO. 92;  
ARNOLD ROSENTHAL, CLAIM NO. 93;  
VICTORIA SMITH, CLAIM NO. 95;  
L. KANANI COHUME, CLAIM NO. 101;  
MICHAEL BAGINSKI, CLAIM NO. 113;  
KAREN PETERSEN TYNDALL TRUST DATED 03/09/94, CLAIM NO. 116;  
KPT IRREVOCABLE TRUST DATED 07/16/99, CLAIM NO. 117;  
JAMES J. LEE, ESQ., CLAIM NO. 121;  
JAMES J. LEE, CLAIM NO. 122;  
WILLIAM CHAD BERRY, CLAIM NO. 126;

1 RDJ INVESTMENTS, CLAIM NO. 130;  
2 RICHARD N. ANDERSON TTE,  
3 RICHARD N. ANDERSON SEPARATE PROPERTY, CLAIM NO. 131;  
4 CRAIG ZAGER SEP IRA, CLAIM NO. 132;  
5 CURTIS R. & TERRI L. COLAGROSS, CLAIM NO. 139  
6 NO. 2286  
7 AND  
8 OBJECTION TO CLAIM 120  
9 OF STANDARD PROPERTY DEVELOPMENT, LLC,  
10 IN THE AMOUNT OF, NO. 2299  
11 AND  
12 OMNIBUS OBJECTION TO CLAIM 115 OF BRIAN M. ADAMS  
13 IN THE AMOUNT OF;  
14 CLAIM 118 OF HERMAN M. ADAMS;  
15 CLAIM 118 OF BRIAN ANTHONY G. ADAMS;  
16 CLAIM 118 OF ANTHONY G. ADAMS OLYMPIA CAPITAL MANAGEMENT,  
17 CLAIM 119;  
18 KANTOR NEPHROLOGY CONSULTANTS, LTD, 401(K) PSP,  
19 GARY KANTOR, TRUSTEE, CLAIM 123;  
20 DR. GARY KANTOR, CLAIM 124;  
21 LYNN M. KANTOR, CLAIM 125, NO. 2301  
22 AND  
23 MOTION FOR PROTECTIVE ORDER, NO. 2441  
24 AND  
25 OBJECTION TO CLAIM 819 OF SPECTRUM FINANCIAL  
IN THE AMOUNT OF \$49,581  
AND CLAIM 821 OF ROLLAND P. WEDDELL  
IN THE AMOUNT OF \$13,081, NO. 2067  
AND  
ORDER SHORTENING TIME  
RE: APPLICATION TO EMPLOY  
DIAMOND, McCARTHY, TAYLOR, FINLEY & LEE, LLP,  
AS SPECIAL LITIGATION COUNSEL APPLICATION  
PURSUANT TO FEDERAL RULES OF BANKRUPTCY PROCEDURE 2014(A)  
FOR ORDER UNDER SECTION 1103 OF THE BANKRUPTCY CODE  
AUTHORIZING THE EMPLOYMENT AND RETENTION  
OF DIAMOND, McCARTHY, TAYLOR, FINLEY & LEE, LLP,  
AS SPECIAL LITIGATION COUNSEL  
TO THE OFFICIAL UNSECURED CREDITORS COMMITTEE  
FOR USA COMMERCIAL MORTGAGE COMPANY, NO. 2505  
AND  
HEARING RE: EMPLOYMENT APPLICATION EXTENSIONS (CONT.)  
NO. 2402  
AND  
STATUS HEARING RE: INVOLUNTARY PETITION, NO. 8  
AND  
ORDER SHORTENING TIME  
RE: MOTION TO ENFORCE AUTOMATIC STAY  
TO PREVENT FORECLOSURE  
BY WESTERN UNITED LIFE ASSURANCE COMPANY, NO. 2561

1 VOLUME 2  
2 BEFORE THE HONORABLE LINDA B. RIEGLE  
3 UNITED STATES BANKRUPTCY JUDGE

4 Wednesday, January 31, 2007

5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24 Court Recorder: Joanne Lloyd  
25 Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

## 1 APPEARANCES:

2 For the Debtor and  
3 Debtor in Possession: ANNETTE W. JARVIS, ESQ.  
4 Ray, Quinney & Nebeker, P.C.  
36 South State Street  
Suite 1400  
Salt Lake City, Utah 84145

5 JEANETTE E. McPHERSON, ESQ.  
6 Schwartzer & McPherson Law Firm  
2850 South Jones Boulevard  
7 Suite 1  
Las Vegas, Nevada 89146

8 For the First Trust CANDACE C. CARLYON, ESQ.  
9 Deed Committee: Shea & Carlyon, Ltd.  
233 South Fourth Street  
10 Suite 200  
Las Vegas, Nevada 89101

11 For the Direct GREGORY E. GARMAN, ESQ.  
12 Lenders Committee: Gordon & Silver, Ltd.  
3960 Howard Hughes Parkway  
13 Ninth Floor  
Las Vegas, Nevada 89109

14 For the Unsecured SUSAN M. FREEMAN, ESQ.  
15 Creditors Committee Lewis and Roca, LLP  
of USA Commercial 40 North Central Avenue  
16 Mortgage Company: Phoenix, Arizona 85004

17 ALLAN B. DIAMOND, ESQ.  
Diamond, McCarthy, Taylor, Finley  
& Lee, LLP  
18 Two Houston Center  
909 Fannin  
19 Suite 1500  
Houston, Texas 77010

20 ERIC D. MADDEN, ESQ.  
21 Diamond, McCarthy, Taylor, Finley  
& Lee, LLP  
1201 Elm Street  
22 34th Floor  
23 Dallas, Texas 75270

## 1 APPEARANCES (Cont.):

2 For USA Commercial JEFFREY R. SYLVESTER, ESQ.  
Real Estate Group: Sylvester & Polednak, Ltd.  
7371 Prairie Falcon Road  
Suite 120  
Las Vegas, Nevada 89128

5 For Standard Property ANDREW M. BRUMBY, ESQ.  
Development, LLC: Shutts & Bowen, LLP  
300 South Orange Avenue  
Suite 1000  
Orlando, Florida 32801

8 For Diversified Trust ANNE M. LORADITCH, ESQ.  
Deed Fund Committee: Beckley Singleton, Chtd.  
530 Las Vegas Boulevard South  
Las Vegas, Nevada 89101

10 For Diversified Trust JEFFERY D. HERMANN, ESQ.  
Deed Fund Committee: Orrick, Herrington & Sutcliffe, LLP  
777 South Figueroa Street  
Suite 3200  
Los Angeles, California 90017

14 For Western United NILE LEATHAM, ESQ.  
Life Assurance Company: Kolesar & Leatham, Chtd.  
3320 West Sahara Avenue  
Suite 380  
Las Vegas, Nevada 89102

17 MICHAEL W. ANGLIN, ESQ.  
Fulbright & Jaworski, LLP  
2200 Ross Avenue  
Suite 2800  
Dallas, Texas 75201

20 For Johnny Clark WILLIAM L. McGIMSEY, ESQ.  
and the McGimsey William L. McGimsey, P.C.  
Creditors: 601 East Charleston Boulevard  
Las Vegas, Nevada 89104

23 For Rolland P. Weddell ELISSA F. CADISH, ESQ.  
and Spectrum Financial Hale, Lane, Peek, Dennison  
Group: & Howard  
3930 Howard Hughes Parkway  
Fourth Floor  
Las Vegas, Nevada 89109

## 1 APPEARANCES (Cont.):

2 For Project Disbursement Group,  
3 Inc.: MATTHEW Q. CALLISTER, ESQ.  
Callister & Reynolds  
823 Las Vegas Boulevard South  
Las Vegas, Nevada 89101

4 For Sondra Skipworth: AARON R. DEAN, ESQ.  
5 McCullough & Associates, Ltd.  
6 601 South Rancho Drive  
Suite A-10  
7 Las Vegas, Nevada 89106

8 For the United States AUGUST B. LANDIS, ESQ.  
Trustee: Office of the United States Trustee  
300 Las Vegas Boulevard South  
9 Suite 4300  
Las Vegas, Nevada 89101

10 For the Jones Vargas JANET L. CHUBB, ESQ.  
11 Direct Lenders,  
12 Joseph Donnolo, and  
Loretta Donnolo: Jones Vargas  
100 West Liberty  
Twelfth Floor  
Reno, Nevada 89501  
13 (Telephonic)

14 For John A. Godfrey: JAMES D. GREENE, ESQ.  
15 Schreck Brignone  
16 300 South Fourth Street  
Suite 1200  
Las Vegas, Nevada 89101

17 For Karen Petersen KELLY J. BRINKMAN, ESQ.  
18 Tyndall: Goold, Patterson, Ales & Day  
4496 South Pecos Road  
19 Las Vegas, Nevada 89121  
(Telephonic)

20 For USA Investment RUSSELL S. WALKER, ESQ.  
21 Partners, LLC, and Woodbury, P.C.  
Joseph Milanowski:  
22 265 East 100 South  
Suite 300  
Salt Lake City, Utah 84111

23 For the Trustee: ANTHONY M. ZMAILA, ESQ.  
24 Santoro, Driggs, Walch, Kearney,  
Johnson & Thompson  
25 400 South Fourth Street  
Third Floor  
Las Vegas, Nevada 89101

1 APPEARANCES (Cont.):

2 Also Present: THOMAS J. ALLISON  
3 Mesirow Financial Interim  
Management, LLC

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 (Court previously convened at 09:38:25 a.m.)

2 (Thereupon, the portion requested to be transcribed  
3 commence at 10:09:04 a.m.)

4 THE COURT: And now Ms. Tyndall's.

5 MS. LORADITCH: Ms. Tyndall's claim, there were  
6 two claims that arose from her investments as a direct  
7 lender, and it was unclear at the time we filed the  
8 objection because we didn't have more information from the  
9 debtors.

10 Since having gotten that, we conferred with  
11 Ms. Tyndall's counsel together with Mesirow Financial, and  
12 they confirmed after doing an investigation that those two  
13 claims in question were, in fact, arising from her  
14 investments as a direct lender and had no connection to  
15 Diversified Fund.

16 And so we were asking that those claims 84 and 85 be  
17 disallowed in their entirety as well as their duplicates  
18 which were claim Nos. 118 and 119.

19 THE COURT: Okay. And, Ms. Brinkman, do you have  
20 any comments?

21 MS. BRINKMAN: This is Ms. Brinkman. No. I don't  
22 have any comments in light of the Court's ruling --

23 THE COURT: Okay.

24 MS. BRINKMAN: -- on McGimsey.

25 THE COURT: So those objections will be sustained

1 as well.

2 MS. LORADITCH: Thank you.

3 MR. McGIMSEY: I --

4 THE COURT: Okay.

5 MR. McGIMSEY: I have one concern --

6 THE COURT: Um-h'm.

7 MR. McGIMSEY: -- with what counsel just stated.

8 Your Honor indicated to me just at the end that you were  
9 ruling that I did not have a creditors claim, and I think  
10 that I don't want from what she said for that ruling to  
11 change or at least I want to understand it.

12 MS. LORADITCH: I apologize. I don't know what I  
13 may have said that was inconsistent with what the Court  
14 ruled.

15 THE COURT: I sustained the objection to the  
16 claim.

17 MS. LORADITCH: Correct. And we had requested  
18 that creditor claims be disallowed that had been filed by  
19 equity interest holders --

20 THE COURT: Right.

21 MS. LORADITCH: -- because their claim against  
22 Diversified Fund arises from their equity interest, and  
23 they'll be distributed on a pro rata basis according to that  
24 interest.

25 THE COURT: Right.

1                   MR. McGIMSEY: Well, my concern was, your Honor,  
2 is you indicated I was not being subordinated. I did not  
3 have a claim, a creditors claim, under 510(b).

4                   THE COURT: Under --

5                   MS. LORADITCH: I think that's --

6                   THE COURT: 510(b) controls. The distribution is  
7 in accordance with that, so it's filed as an equity claim  
8 and not a creditors claim.

9                   MR. McGIMSEY: I don't have a creditors claim.

10                  THE COURT: All right. You don't have a creditors  
11 claim.

12                  MR. McGIMSEY: That's --

13                  THE COURT: Okay.

14                  MR. McGIMSEY: That's the ruling not that I want.

15                  THE COURT: I know. I understand, so you need it  
16 for clarity.

17                  MR. McGIMSEY: Yes.

18                  THE COURT: I appreciate that.

19                  MR. McGIMSEY: Thank you.

20                  MS. LORADITCH: Thank you.

21                  THE COURT: Okay. Next, we have the PBGC which  
22 has been withdrawn.

23                  Then on page 4, we've got Mr. Callister's application  
24 for compensation.

25                  (Colloquy not on the record.)

1 MR. CALLISTER: Matthew Callister on behalf of  
2 PDG, your Honor. Good morning. This is our application  
3 under Section 503(b) on behalf of Project Disbursement  
4 Group. I'm sure the Court's familiar with --

5 THE COURT: Well, under what --

6 MR. CALLISTER: -- the pleadings.

7 THE COURT: -- under 503(b)?

8 MR. CALLISTER: Well --

9 THE COURT: You never quite told anybody --

10 MR. CALLISTER: -- Under --

11 THE COURT: -- what section --

12 MR. CALLISTER: -- the --

13 THE COURT: -- you were seeking.

14 MR. CALLISTER: I guess as pointed out in the  
15 opposition, your Honor, we believe that we provided  
16 substantial beneficial interest to the estate. I understand  
17 the opposition. The Court will recall the scenario.

18 We submitted a stipulation. We executed it. The  
19 debtor executed it, and then the Court decided that it  
20 needed to be provided and executed, signed off on by the  
21 various committees. That never came back.

22 We're having threats of litigation against individual  
23 investors who are saying there have not been a distribution  
24 of interest payments since March. Don't you dare do that.  
25 You're controlling millions of dollars of money. We don't

1 know what's going on.

2 So we sought the protection of an order and finally got  
3 it and have been honoring that order and the contract  
4 obligation since that time.

5 THE COURT: Okay.

6 MR. CALLISTER: We simply don't think we did  
7 anything, other than what we should have done under the  
8 circumstances, thought it was in the best interest of both  
9 the estate, obviously, than my clients, your Honor.

10 THE COURT: Okay. All right. Opposition.

11 MS. McPHERSON: Your Honor, Jeanette McPherson on  
12 behalf of the debtors. PDG or Callister & Reynolds simply  
13 don't come within the express statutory language of 503.

14 They're not creditors. They're not professionals for  
15 creditors, and they didn't provide any substantial  
16 contribution to the estate.

17 In fact, we think their actions were detrimental to the  
18 estate, and that they weren't abiding by the disbursement  
19 agreement which caused several issues.

20 We did finally reach a stipulation, but the fact is  
21 they weren't abiding by the agreement that existed between  
22 them and the debtors.

23 THE COURT: Okay.

24 MR. CALLISTER: Oh, I'm sorry.

25 MS. FREEMAN: Susan Freeman for the Unsecured

1 Creditors Committee. We joined in the debtor's objection.  
2 There really has been no substantial contribution here and  
3 no meeting of the requirements, and there has been no reply  
4 to our response that raised all these points.

5 THE COURT: Right.

6 MR. CALLISTER: Again, just to be brief,  
7 your Honor, as they point out in the in re Christian Life  
8 Center case, the test that's operable here --

9 THE COURT: Well, but wait.

10 MR. CALLISTER: -- is --

11 THE COURT: You're not a creditor.

12 MR. CALLISTER: I understand. We're not a  
13 creditor.

14 THE COURT: So how do you fit in?

15 MR. CALLISTER: We think under the 503(b)(3)(D)  
16 referenced in the --

17 THE COURT: Right.

18 MR. CALLISTER: -- in re Christian Life Center --

19 THE COURT: It says, "A creditor, indenture  
20 trustee, or equity security holder, or a committee, other  
21 than --

22 MR. CALLISTER: I understand.

23 THE COURT: -- a committee in making substantial  
24 contributions." It's a two-part test.

25 MR. CALLISTER: I understand, your Honor.

1                   THE COURT: So how do you fit the first part of  
2 the test?

3                   MR. CALLISTER: I don't think we fall squarely  
4 within the first part of the test. I understand that, but,  
5 nevertheless, I think the response was the appropriate one  
6 given the millions of dollars that we were holding, being  
7 told by individual investors that they had not been paid,  
8 and then threatening us with litigation if we should go  
9 forward without some blessing or order of the Court.

10                  So we executed the -- entered negotiations, got the  
11 stipulation, and the problem was the creditors committee,  
12 the same ones who are here opposing us today, simply did not  
13 sign off on the stipulation.

14                  I asked counsel what their position was when they were  
15 sitting on that stipulation from May until nearly the end  
16 June, the time of the hearing.

17                  THE COURT: Okay. Well, I'm going to deny the  
18 request. I mean, in order to be allowed administrative  
19 expenses, one must fit themselves within the provisions of  
20 503.

21                  And then 503(b)(3) under certain circumstances will  
22 allow one who makes a substantial contribution to receive  
23 fees.

24                  And, first of all, I don't think it was a substantial  
25 contribution. It has to be more than -- I mean, the

1       circuits recognize that substantial contribution can include  
2       your own self-interest, but it has to be "substantial  
3       contribution". Both words must be taking effect.

4           And, more importantly, it has to be done by a creditor,  
5       indenture trustee, equity security holder, or committee,  
6       other than an official committee, so I'll deny the request.

7           MR. CALLISTER: Thank you, your Honor.

8           THE COURT: Okay. Thank you. Okay.

9           Next, we have the omnibus objections to the misfiled  
10      claims.

11           MS. CARLYON: Thank you, your Honor.

12       Candace Carlyon on behalf of the First Trust Deed Committee.  
13       This is our objection to a number of claims that while filed  
14       in the First Trust Deed Fund -- excuse me -- relate either  
15       to investments in the Diversified Trust Deed Fund or to  
16       direct-lender interests as to particular loans.

17       The one exception is claim No. 138 to which our  
18       objection has been withdrawn, and the Court approved that,  
19       previously.

20       We have had no filed response. We received a letter  
21       with regard to claims 86, 87, 88, 116, 117 requesting that  
22       there be an evidentiary showing which we complied with and  
23       have had no further communication. And, in fact, no  
24       opposition was filed to the motion.

25       So we would request that the Court disallow those

1 claims as set forth on Exhibit 2, Docket No. 2285. I can  
2 read the numbers into the record if you like. I don't know  
3 that it's necessary --

4 THE COURT: I don't think we need to.

5 MS. CARLYON: -- with the exception, of course, of  
6 138.

7 THE COURT: Okay. All right. Anyone here on any  
8 of those objections?

9 (No affirmative response.)

10 THE COURT: All right. Those objections are  
11 sustained.

12 And you've checked to make sure we're not as my concern  
13 before cross-whipsawing?

14 MS. CARLYON: We have, your Honor. And, in fact,  
15 I appreciate the opportunity to clarify the position on  
16 that.

17 As to claims which are clearly USACM claims, we have  
18 agreed with the debtors and the committees that the order  
19 will provide that those will be deemed filed in that case  
20 without prejudice to the right to object as of the date they  
21 were filed in First Trust Deed Fund to make sure that that  
22 doesn't happen to any of these investors who may have been  
23 just confused by the number of debtors.

24 THE COURT: Okay. Thank you.

25 MS. CARLYON: All right.

1                   THE COURT: Comment --

2                   MS. CARLYON: (Indiscernible).

3                   THE COURT: -- someone had?

4                   MR. DEAN: Aaron -- excuse me. Aaron Dean on  
5 behalf of Sondra Skipworth. I'm a little confused. I was  
6 just curious if this objection applied to claim No. 74. I  
7 know you said you were going to list those.

8                   THE COURT: It's on the docket. Is there any  
9 reason it shouldn't?

10                  MS. CARLYON: Yes, your Honor. Claim No. 74 is  
11 one of the claims as to which we objected based on it being  
12 misfiled.

13                  And, in fact, claim No. 74, the claimant is not an FTD  
14 member. It appears to be based on a loan made to  
15 Hacienda Estate, LLC, which I assume would be a  
16 direct-lender claim.

17                  MR. DEAN: That's potentially correct, your Honor.  
18 I just received the file this morning. Ms. Skipworth has  
19 been doing this on her own. Apparently, she did misfile her  
20 claim into another case.

21                  I'm here this morning to see if I can find out exactly  
22 which case it should have actually been filed to to see if  
23 we can make the proper amendments to get this claim filed --

24                  THE COURT: Okay.

25                  MR. DEAN: -- where it needs to be.

1                   THE COURT: Why don't you just meet with counsel  
2 afterwards because it sounds like that everybody -- the  
3 point being, everybody's willing to let it be nunc pro tunc  
4 back to the case that it should have been filed in, so  
5 nobody's adversely affected.

6                   MR. DEAN: Thank you, your Honor.

7                   THE COURT: Thank you.

8                   MR. DEAN: I'll wait 'til afterwards.

9                   MS. CARLYON: Thank you.

10                  MS. FREEMAN: Just to confirm from the perspective  
11 of the Unsecured Creditors Committee, we do agree that the  
12 claim can be treated as if it was filed in the USA  
13 Commercial Mortgage estate on the date that it was filed.

14                  THE COURT: Okay. Thank you.

15                  Let me skip a moment to -- oh, here's another one  
16 that's unopposed, page 7, Docket 8, the omnibus objection,  
17 Brian Adams, et al.

18                  MS. CARLYON: Candace Carlyon on behalf of the  
19 First Trust Deed Fund. Your Honor, we stipulated to  
20 continue the objection as to claims 123, 124, and 125. We  
21 have had no opposition on claims No. 115, 118, and 119, and  
22 would ask that the objection be sustained.

23                  THE COURT: All right. And, again, they'll relate  
24 back if they're in a different case, and you've checked  
25 that?

1 MS. CARLYON: Yeah. Your Honor, I will check  
2 that. I don't think that was an issue with these claims,  
3 but I'll make sure.

4 THE COURT: Okay.

5 MS. CARLYON: Thank you.

6 THE COURT: All right. So with that, those three  
7 are sustained. The other, do you want to continue to our  
8 next date?

9 MS. CARLYON: I believe we continued to the  
10 March 31st date.

11 THE COURT: Okay.

12 MS. CARLYON: And that order was already entered.

13 THE COURT: Okay.

14 MS. CARLYON: Let me just --

15 THE COURT: Thank you.

16 MS. CARLYON: -- make sure.

17 THE COURT: Let me skip to page 9, the application  
18 to employ Diamond, McCarthy.

19 MS. CARLYON: I'm sorry, your Honor. If I could  
20 just clarify? Docket No. 2559 is this Court's order  
21 approving the continuance to March 1st --

22 THE COURT: March 1st.

23 MS. CARLYON: -- at 9:30 --

24 (Colloquy not on the record.)

25 THE COURT: Okay.

1 MS. CARLYON: -- on the Kantor claims.

2 MS. FREEMAN: Susan Freeman, your Honor, on behalf  
3 of the Official Unsecured Creditors Committee in USA  
4 Commercial Mortgage Estate.

5 MR. DIAMOND: Good morning, your Honor.

6 Alan Diamond with Diamond, McCarthy.

7 MS. FREEMAN: This is a matter, your Honor, where  
8 we have asked that the special litigation counsel that the  
9 USACM trust has decided to employ be employed on an interim  
10 basis on behalf of the committee, so they can get up to  
11 speed, deal with getting books and records, making sure that  
12 there is no break in chain of custody, and those kinds of  
13 problems get started on the litigation that we intend to  
14 pursue.

15 We agreed with the U.S. Trustee we would make it very  
16 clear here on the record that there is not a request to seek  
17 compensation from this estate. The only compensation that  
18 will be paid will be paid from the trust after the effective  
19 date of the plan.

20 MR. DIAMOND: Yeah. And, your Honor, I might say  
21 that it's a pleasure, indeed, to be back before your Honor  
22 in this court.

23 Just to confirm our role that we're being asked to  
24 provide as special litigation counsel to the Unsecured  
25 Creditors Committee, the USACM, is to get in there,

1 investigate, analyze, and commence if necessary and  
2 appropriate any litigation claims.

3           Ultimately, of course, we have been selected by  
4 Mr. Berman as the trustee of the postconfirmation trust as  
5 special litigation counsel once that trust becomes effective  
6 under the plan.

7           THE COURT: Okay. All right. Mr. Landis, any  
8 comments?

9           MR. LANDIS: Very briefly, your Honor. We did  
10 have the opportunity to visit with counsel for the Unsecured  
11 Creditors Committee.

12           Our only concern was we're sort of in a gap period now  
13 because we're waiting for the effective date of the plan.  
14 They have addressed those concerns.

15           Now, with the statements on the record that the estates  
16 will not be charged for these fees, I think we got quality  
17 counsel who will do the job well. I'm familiar with their  
18 involvement in prior cases before the Court.

19           THE COURT: Okay. Thank you. All right.  
20 So that's approved.

21           MS. JARVIS: Yes.

22           MS. FREEMAN: Thank you.

23           THE COURT: Let me --

24           MS. FREEMAN: We have a form of order that's been  
25 approved --

1                   THE COURT: Oh, sorry.

2                   MS. FREEMAN: -- by everyone. We will upload it.

3                   MS. JARVIS: Your Honor --

4                   THE COURT: Okay. Thank you.

5                   MS. JARVIS: Your Honor, if I could just say? The  
6 debtors are working with them, and we believe this makes  
7 sense. It would make a smooth transition.

8                   THE COURT: Yes. All right. Let me go back to  
9 item 10, the Spectrum Financial.

10                  (Colloquy not on the record.)

11                  THE COURT: Appearances.

12                  MS. McPHERSON: Jeanette McPherson on behalf of  
13 the debtors.

14                  MS. CADISH: Good morning, your Honor.

15                  Elissa Cadish on behalf of Rolland Weddell and Spectrum  
16 Financial Group.

17                  THE COURT: On a housekeeping matter, did your  
18 office send my office courtesy copies of your responses?

19                  MS. CADISH: The answer is I don't know,  
20 your Honor, and I apologize --

21                  THE COURT: My notes --

22                  MS. CADISH: -- if we did not.

23                  THE COURT: -- indicate we had to print them all  
24 out, and I have sanctioned Ms. Carlyon's firm and other  
25 firms who are -- not sanctioned -- had them offset their

1 fees for not having provided documents, so that's \$75  
2 payable to the court.

3 MS. CADISH: Yes, your Honor.

4 THE COURT: And that --

5 MS. CADISH: I'll take care of that, and I  
6 apologize for the oversight.

7 THE COURT: And you can understand with the  
8 filings like this it's just the only way we can keep up.

9 MS. CADISH: I do, and, again, it was an  
10 oversight, and I'll make sure it doesn't happen again.

11 THE COURT: On this one, it seems to me we  
12 (indiscernible) just going to have to set this for an  
13 evidentiary hearing, right?

14 Have you done a -- do you want to just do a discovery  
15 plan and do it in that context or postpone it until we see  
16 happens in this case? What's your thinking?

17 MS. McPHERSON: Well, your Honor, during this  
18 transition period, I thought if we set it over for 30 days.  
19 In the meantime, we can discuss a discovery plan and  
20 scheduling and then maybe set this again for the  
21 March 1st --

22 THE COURT: Okay.

23 MS. McPHERSON: -- omnibus hearings, and then we  
24 can pick dates at that time.

25 THE COURT: Sure. Is --

1 MS. CADISH: I agree with that.

2 THE COURT: Okay. So we'll set this over to  
3 March 1st. Is that soon enough for you -- too soon I mean  
4 or about right? It's about a month away.

5 MS. McPHERSON: I think --

6 MS. CADISH: That's fine.

7 MS. McPHERSON: -- that's fine.

8 THE COURT: Okay. Good. Okay.

9 Thank you.

10 MS. McPHERSON: Thank you.

11 MS. CADISH: Thank you, your Honor.

12 THE COURT: Okay. Now, let's go to one other  
13 matter on the employment extensions on item No. 12.

14 MS. JARVIS: Your Honor, we have filed a motion to  
15 extend the employment of Mesirow and Mr. Allison as the  
16 interim crisis managers for the debtors, Ray, Quinney &  
17 Nebeker, and Schwartzer McPherson as counsel for the debtors  
18 and debtors in possession through March 31st or earlier if  
19 we are able to conclude our role by then.

20 Hopefully, we will finish that before March 31st. If  
21 there is some delay, then we would come back to the Court  
22 and ask for a further extension.

23 THE COURT: Okay. All right. I note the  
24 trustee's prior objections, and I'll overrule them and  
25 continue the employment. It certainly makes no sense at

1 this time to change horses. All right.

2 Now, the first one, going back to the first matter on  
3 calendar, the motion to enforce.

4 MR. SYLVESTER: Good morning again, your Honor.

5 Jeffrey Sylvester of Sylvester & Polednak on behalf of  
6 USA Commercial Real Estate Group.

7 Your Honor, this is the third time we've been back on  
8 this same motion. You may recall at the last hearing the  
9 Court requested additional briefing with respect to the  
10 effect, if any, of the confirmed plan with respect to the  
11 claim of USA Commercial Real Estate Group, and I think both  
12 sides have fully briefed that issue.

13 I will tell you that last night -- actually, on Monday,  
14 an adversary complaint was amended to include a claim  
15 against USA Commercial Real Estate Group alleging a  
16 fraudulent transfer and also alleging setoff and recoupment  
17 as it relates to the \$180,000.

18 Last evening, there was a motion for a writ of  
19 attachment filed that is I believe set for the end of March,  
20 and that's what's transpired since the last hearing.

21 THE COURT: You need to move your microphone a  
22 little bit closer to your face or you can move the stand --

23 MR. SYLVESTER: Or my face --

24 THE COURT: -- if you wish.

25 MR. SYLVESTER: -- closer --

1 THE COURT: Your --

2 MR. SYLVESTER: -- to the microphone --

3 THE COURT: That's right.

4 MR. SYLVESTER: -- either one.

5 THE COURT: Either one. Either one.

6 MR. SYLVESTER: I can do both.

7 Thank you, your Honor.

8 THE COURT: The podium does go up and down. It's  
9 counterintuitive, but it does go up and down.

10 MR. SYLVESTER: Okay. Is that better?

11 THE COURT: Yes. That's fine.

12 MR. SYLVESTER: All right. Let me just address  
13 very briefly the debtor position as it relates to  
14 subordination because at the last hearing that was,  
15 apparently, the primary argument that was made or asserted  
16 in opposition to the release of the funds.

17 In essence, what the debtor has argued is that the plan  
18 ipso facto subordinated the claim of USA Commercial Real  
19 Estate Group to those of the unsecured creditors.

20 And I think that the analysis begins and ends with I  
21 think what the debtor will now concede is fact, and that is  
22 that the moneys that are being held do not constitute  
23 property of this bankruptcy estate. They just simply don't.

24 There's nothing in the terms of the plan that would  
25 suggest that those funds that are being held are, in fact,

1 property of the estate.

2       The terms of the plan as it relates to distribution to  
3 insiders provides that no insider shall receive a  
4 distribution under the terms of the plan.

5       But it does not affect -- it does not expressly or  
6 impliedly state that they are transmuting funds that are not  
7 property of the estate into property of estate and  
8 distributing those funds to creditors, and that's the  
9 fundamental flaw in the argument.

10       Their brief specifically states that as a result of the  
11 confirmed plan no entity may receive any payment or assert  
12 any right to payment against assets of USA Commercial  
13 Mortgage, and that's not what we have.

14       I think that the debtor will concede. At least, I hope  
15 that academically they'll concede that the funds that they  
16 hold under Section 541 do not constitute property of the  
17 estate.

18       They don't constitute property of the estate under the  
19 Ninth Circuit decision of in re Golden Triangle. They don't  
20 constitute property of the estate under the terms and  
21 conditions of the loan-servicing agreement. They're just  
22 simply not property of the estate.

23       There is no claim or right to payment that  
24 USA Commercial Real Estate Group could have asserted for the  
25 return of those funds.

1           And if we acknowledge that those funds are held in  
2 trust, then the United States Supreme Court tells us that  
3 those funds cannot be distributed to anybody, other then the  
4 trust beneficiaries, and that is the trust beneficiaries  
5 being USA Commercial Real Estate Group.

6           If you look at the terms of the implementation of the  
7 plan as set forth in the disclosure statement, there is no  
8 express or implied suggestion that they are going to take  
9 the funds that belong to the direct lenders and make those  
10 funds property of the estate, and that those funds will be  
11 available for distribution to the unsecured creditors or to  
12 any creditors in this estate.

13           Now, remember how we got here is is that there was an  
14 implicit acknowledgment by the debtors that the funds that  
15 they were collecting pursuant to these loan service  
16 agreements belonged to the direct lenders.

17           And that is why they came to this Court in July of 2006  
18 and asked for permission to distribute those funds to those  
19 who are entitled to receive them. The Court allowed that  
20 subject to some modifications that relates to the netting of  
21 the loan service fees.

22           But the \$60,000,000 that belonged to the direct lenders  
23 were disbursed to the direct lenders because those funds  
24 were held in trust.

25           Then the order was amended to allow additional

1 disbursements, another \$60,000,000 or a total of  
2 \$120,000,000, that were disbursed because they weren't funds  
3 that belonged to the estate. Those were funds that belonged  
4 to the direct lender.

5 The debtor will concede that my client is a direct  
6 lender and is not to be treated any different than any other  
7 direct lender.

8 The plan confirmed, identified, or articulated the  
9 compromise that the debtor reached with the direct lenders,  
10 and the direct lenders and the debtors agreed that those  
11 funds that are being held in trust and collected pursuant to  
12 the loan service agreements would continue to flow to the  
13 direct lenders.

14 In essence, they incorporated the terms and conditions  
15 of the prior protocols as it relates to the disbursements of  
16 the funds held in trust.

17 The debtor has to concede it, although they haven't  
18 said that, but they have to concede that the funds are held  
19 in trust and don't belong to this debtor and cannot be  
20 distributed pursuant to the plans because they have now  
21 sought a writ of attachment.

22 And if, in fact, that they believe their argument that  
23 the terms of the plan precluded distribution of those funds  
24 there would be no need for a claim of recoupment or setoff  
25 to be asserted.

1                   THE COURT: Well, but isn't that just a  
2 belt-and-suspenders argument? I mean, you got to make --

3                   MR. SYLVESTER: I --

4                   THE COURT: -- both arguments.

5                   MR. SYLVESTER: I don't. Well, I don't know. I  
6 mean, they filed this pleading under Rule 11. And in the  
7 pleading that they have filed with this court, what they are  
8 saying very expressly is that they are holding these funds  
9 for USA Commercial Real Estate. They cited that both in  
10 their claim of recoupment in the adversary complaint and,  
11 specifically, at paragraph 25.

12                  THE COURT: Well, but the federal rules allow you  
13 to plead in the alternative, clearly.

14                  MR. SYLVESTER: Yes. But you can plead in the  
15 alternative, but you can't plead alternative factual bases.  
16 You can plead alternative legal theories.

17                  But you can't say on the one hand it's held in trust  
18 and the other hand it's not held in trust. Or on the one  
19 hand, it's property of the estate. On the other hand, it's  
20 not property of the estate. That is a factual statement  
21 that doesn't fall within the alternative-pleading rules  
22 under the federal rules.

23                  And they have said in their motion that they are  
24 collecting these funds as the servicer of the loan, and that  
25 it is anticipated that additional sums will be collected by

1 the debtor on loans in which Commercial Real Estate Group is  
2 a lender. They are collecting these funds on behalf of or  
3 for the benefit of USA Commercial Real Estate Group.

4 THE COURT: Well, let me ask this. Let's just  
5 suppose that since it was your clients that were not paying  
6 out your -- the people that own the company you represent  
7 were the same people who weren't paying out money on loans,  
8 and let's assume somebody sued them for not distributing  
9 funds, and they said, no, I don't have the money or whatever  
10 reason. Your next recourse if you were the third party is  
11 to sue them, right?

12 MR. SYLVESTER: To sue the company --

13 THE COURT: Right.

14 MR. SYLVESTER: -- for nondistribution?

15 THE COURT: Right.

16 MR. SYLVESTER: Okay. I believe that's -- if I  
17 follow your analogy, if they --

18 THE COURT: So in other words --

19 MR. SYLVESTER: -- breached --

20 THE COURT: -- you're asking for a motion to  
21 distribute. Isn't your remedy a suit for breach of  
22 contract?

23 In which case the suit for breach of contract, they  
24 then raise all of the various defenses that they have. I  
25 mean, where is that -- I mean, we've done this motion to

1 distribute, and I --

2 MR. SYLVESTER: Correct.

3 THE COURT: -- understand that, and we've never  
4 really visited, well, the procedure, but isn't the real  
5 point that you'd have to sue for breach of contract?

6 MR. SYLVESTER: To the extent that I suffered  
7 damages as a result of the breach of the contract. But  
8 under your analysis, is the company holding the funds as a  
9 trustee for the benefit of the third parties or is it simply  
10 they breached the contract because they haven't serviced the  
11 loans or they haven't collected the funds?

12 THE COURT: Both.

13 MR. SYLVESTER: Well, I think it makes a  
14 difference because, yeah, you would have --

15 THE COURT: I mean, your client held the funds and  
16 didn't turn them over.

17 MR. SYLVESTER: Sure. And they don't belong to  
18 them, and the right I guess would be to claim conversion if  
19 you will or to seek some other remedies --

20 THE COURT: So isn't your remedy --

21 MR. SYLVESTER: -- under law.

22 THE COURT: I mean, don't you have to file a  
23 claim? And once you had to file a claim for breach of  
24 contract, doesn't that fit you within the terms of the plan?

25 MR. SYLVESTER: I don't think so. That's true if

1 the debtor was taking the position that they owned the funds  
2 that they weren't held --

3 THE COURT: Even if they --

4 MR. SYLVESTER: -- in trust.

5 THE COURT: -- didn't turn them over. All right?

6 Let's assume this is outside bankruptcy. All right?

7 MR. SYLVESTER: Um-h'm.

8 THE COURT: A loan mortgage company didn't turn  
9 the funds over.

10 MR. SYLVESTER: Right.

11 THE COURT: You can't go to court and say compel  
12 them to disburse. You file a complaint for breach of  
13 contract, the remedies among which are declaratory relief,  
14 damages, accounting, and turnover, right?

15 MR. SYLVESTER: I think that's fair.

16 THE COURT: So since you have to file the  
17 complaint, doesn't that fit you within the provisions of the  
18 plan?

19 MR. SYLVESTER: I don't think so because the  
20 provisions of the plan don't -- and I guess that's the  
21 primary difference between a state court action and property  
22 of the estate under Section 541. This debtor is not coming  
23 before this Court and saying that they own these funds.

24 THE COURT: All right.

25 MR. SYLVESTER: This debtor has come before this

1 Court on four different occasions and said we don't own  
2 these funds. In essence, these funds belong to the direct  
3 lenders.

4 We're going to service those, and we're going to take  
5 our two percent or whatever, our loan-services fee, but  
6 those aren't our money. We're not going to utilize those  
7 funds to fund our plan of reorganization.

8 And if you look, in fact, in the disclosure statement,  
9 there is no suggestion that they are taking the direct  
10 lenders' funds held in trust to fund this plan of  
11 reorganization.

12 If the debtor had come before this Court in their  
13 disclosure statement, one of many, or their plan, one of  
14 many, and said we are going to transmute these funds that we  
15 acknowledge are held in trust, and they're going to now  
16 become property of the estate, and I didn't object, then,  
17 perhaps, I'm precluded.

18 Perhaps, I'm concluded because, frankly, I don't think  
19 this Court would have the authority to enter an order  
20 modifying the nature of the property.

21 For instance, you can't sell property under Section 363  
22 that the debtor doesn't own, and you couldn't allow the  
23 debtor to fund a plan of reorganization with proceeds of a  
24 trust that --

25 THE COURT: But you'd still have to file a

1 complaint for conversion.

2 MR. SYLVESTER: If they claimed an interest in it,  
3 and they don't.

4 THE COURT: No. Conversion is -- or even --

5 MR. SYLVESTER: The wrongful --

6 THE COURT: -- embezzlement.

7 MR. SYLVESTER: -- dominion and control over  
8 somebody else's property.

9 THE COURT: Right.

10 MR. SYLVESTER: And --

11 THE COURT: You can't --

12 MR. SYLVESTER: And that's --

13 THE COURT: -- just --

14 MR. SYLVESTER: -- true.

15 THE COURT: -- file a motion to do that. You have  
16 to file a complaint, right?

17 MR. SYLVESTER: I don't -- well, in bankruptcy  
18 court, I think you'd probably have to file an adversary  
19 complaint to have them --

20 THE COURT: Yeah.

21 MR. SYLVESTER: -- turn over --

22 THE COURT: By adversary.

23 MR. SYLVESTER: -- the funds.

24 THE COURT: Um-h'm.

25 MR. SYLVESTER: I think that's probably true. And

1 if your analogy was that or hypothetical was that this  
2 debtor claimed to own those funds, then I think that I would  
3 have to protect myself.

4 THE COURT: No. Let's just assume they refuse to  
5 turn it over. Assume somebody outside bankruptcy, your  
6 client, refused to turn it over.

7 MR. SYLVESTER: Outside of bankruptcy.

8 THE COURT: Right. Outside of bankruptcy.

9 MR. SYLVESTER: I think I would have to -- if I  
10 can't exercise self-help, I have to file an action. I'd  
11 have to get somebody to compel them to turn it over or I  
12 have to go to the --

13 THE COURT: I mean, under the contract even.  
14 Under the various loan-servicing contracts, they had the  
15 right to terminate.

16 MR. SYLVESTER: But they don't have --

17 THE COURT: But they didn't have --

18 MR. SYLVESTER: -- the right --

19 THE COURT: -- the right --

20 MR. SYLVESTER: -- to hold the funds.

21 THE COURT: -- to go in and demand the money.  
22 They had the right to sue.

23 MR. SYLVESTER: Right.

24 THE COURT: But they didn't have the right to go  
25 in. And, in essence, what you're doing is asking them to

1 attach the money. You're asking them to do that by taking  
2 it.

3 MR. SYLVESTER: Well, you asked them to do that,  
4 candidly, to file a writ of attachment.

5 THE COURT: No, no, no. No. It goes both  
6 directions.

7 MR. SYLVESTER: Sure.

8 THE COURT: The point is if it's not property of  
9 the estate they may have to do a writ of attachment. My  
10 point is, in essence, isn't that what you're doing under  
11 your motion as opposed to a complaint? How can you get that  
12 -- let's assume it was --

13 MR. SYLVESTER: And --

14 THE COURT: -- your money.

15 MR. SYLVESTER: And --

16 THE COURT: Let's assume there were absolutely no  
17 claims against your clients.

18 MR. SYLVESTER: Right.

19 THE COURT: Let's assume there was --

20 MR. SYLVESTER: Right.

21 THE COURT: -- no setoff. Let's assume there was  
22 no recoupment. Let's just assume somebody says we don't  
23 want to pay you today.

24 MR. SYLVESTER: Right. And I think the direct  
25 answer to your question is under these facts in this case I

1 didn't have to --

2 THE COURT RECORDER: I'm sorry, Counsel.

3 MR. SYLVESTER: -- file a --

4 THE COURT RECORDER: Would you move closer --

5 MR. SYLVESTER: Sure. Under these --

6 THE COURT RECORDER: -- to the microphone?

7 MR. SYLVESTER: -- facts in this case --

8 THE COURT RECORDER: Thank you.

9 MR. SYLVESTER: -- I didn't have to file because  
10 you had ordered that the funds that they had collected on  
11 behalf of the direct lenders be distributed to the direct  
12 lenders. That's the order of this Court on not one, on not  
13 two, but now three occasions.

14 And so what I have done is asked to enforce the order  
15 of the Court, and we did that preconfirmation because that's  
16 what the Court ordered.

17 To the extent that they -- and, remember, your Honor,  
18 it's not their position that these funds don't belong to my  
19 client.

20 Their initial opposition was that we just want a  
21 comfort order because, you know, we may have claims against  
22 USA Commercial Real Estate Group.

23 They have never claimed not to this day an interest in  
24 those funds. They don't claim to own those funds. And if  
25 they don't claim to own those funds and if this Court has

1 already previously ordered now on three occasions that they  
2 be disbursed, then the proper forum is in this court today  
3 under this motion to seek to enforce the order.

4 What you are suggesting and what the debtor is  
5 suggesting is that, well, there should have been a claim.  
6 Well, if that's true, then every direct lender in order to  
7 be entitled to receive payment should have filed a proof of  
8 claim.

9 But this Court may recall that the direct lenders were  
10 not permitted to file proofs of claim in this bankruptcy  
11 estate save and except for claims of unremitted principal or  
12 claims that related to some fraud that gave rise to a claim  
13 outside of the service agreement itself.

14 We weren't even authorized to file a proof of claim,  
15 and I think that you were hearing objections by the various  
16 committees to the proof of claims that the direct lenders  
17 did file.

18 Getting back to the issue of subordination, there is  
19 nothing in the disclosure statement, the first one or the  
20 second one or the third one or the proposed plan, that  
21 suggests that my client is going to be treated any  
22 differently than any direct lender. They could have done  
23 that, and they didn't.

24 They could have said that USA Commercial Real Estate  
25 Group even though it's a direct lender they have to file a

1 proof of claim because we have rights of setoff or they have  
2 to file a proof of claim because we have transmuted the  
3 trust asset to an asset of the bankruptcy estate, and they  
4 didn't.

5 They simply said you've got a general subordination  
6 provision that says if you're going to get a distribution  
7 from the estate, then it's subordinated.

8 But their plan does not provide for distribution of the  
9 funds held in trust to anybody. It just doesn't, except  
10 that the compromise with the direct lenders states that the  
11 funds that they receive in trust will be distributed, and I  
12 am not treated any differently.

13 And for those reasons, I think that the Court is  
14 compelled, respectfully, to issue an order allowing those  
15 funds to be released. Now, I understand that there's a  
16 motion for a writ of attachment pending, but that's for  
17 another day.

18 THE COURT: Okay.

19 MR. SYLVESTER: Thank you, your Honor.

20 THE COURT: All right. Opposition.

21 MS. JARVIS: Your Honor, first, I think we need to  
22 understand who USA Real Estate Group is. It's an entity  
23 that's wholly owned by Tom Hantges and Joseph Milanowski.

24 It has no employees. And other than HMA which is  
25 currently the subject of an adversary proceeding, it has no

1 other clients or customers.

2 It is supposedly a real estate brokership. Tom Hantges  
3 is the only broker that they have had since at least over a  
4 year.

5 Further, since the filing of their motion to  
6 distribute, we have discovered through 2004 examinations  
7 that have been taken, actually, since the last hearing on  
8 this before the Court that USA Real Estate Group has  
9 received \$435,000 from the Royal Hotel closing after  
10 Mr. Milanowski told Mr. Allison that Diversified Fund would  
11 be paid millions of dollars from the proceeds after we had  
12 traced I think it's 4.6 million dollars directly from  
13 Diversified into the Royal Hotel and 9,000,000 indirectly.

14 There is no evidence that we have been able to  
15 ascertain that USA Real Estate did any services for  
16 Royal Hotel, and, yet, they were paid ahead of the claims of  
17 Diversified Trust Fund that have direct claims on the  
18 Royal Hotel.

19 It's argued that we concede that this is not property  
20 of the estate, this money that is to be distributed, and  
21 that is not correct, your Honor.

22 We did reserve our rights in the plan. The plan is  
23 very clear that with respect to these nondebtor insiders  
24 they are subordinated claims. They are not part of the  
25 direct-lender groups.

1           If you look at paragraph 81 of the confirmation  
2 order --

3           THE COURT: I need -- hang on one second. You  
4 need to point me to that. It's in your pleading, right?

5           MS. JARVIS: Yeah. 81 of the confirmation order.  
6 I'm not sure that that's attached.

7           THE COURT: Oh, it's not?

8           (Colloquy not on the record.)

9           MS. JARVIS: Let me preliminarily say, your Honor,  
10 that it's very clear that the nondebtor insider definition  
11 was --

12          THE COURT: Oh, there's no question of that.

13          MS. JARVIS: It's --

14          THE COURT: I --

15          MS. JARVIS: Yeah. It's --

16          THE COURT: And I don't --

17          MS. JARVIS: It's in there, so --

18          THE COURT: Now, just so we're clear, this is  
19 money to which we've already applied. Let's be clear what  
20 money we're talking about, too. As I understand it, this is  
21 money that USA Realty purportedly was a direct lender in.

22          MS. JARVIS: That is correct, your Honor.

23          THE COURT: And moneys had been paid back on those  
24 loans. And after recoupment and netting applicable to  
everybody else, there is still some sum of money which but

1 for everything else would go to them.

2 MS. JARVIS: That is correct, your Honor.

3 THE COURT: Okay. And if they weren't insiders in  
4 other words --

5 MS. JARVIS: Yeah.

6 THE COURT: -- it would clearly go to them. Okay.

7 MS. JARVIS: And, you know, your Honor --

8 THE COURT: So we've already applied --

9 MS. JARVIS: Okay.

10 THE COURT: -- the netting that everybody else  
11 is --

12 MS. JARVIS: Right.

13 THE COURT: -- subjected to.

14 MS. JARVIS: And as you recall, your Honor, in the  
15 motions to distribute that we did on an interim basis, we  
16 never conceded, and the issue was avoided on whether this  
17 was property of the estate or not.

18 THE COURT: That's right.

19 MS. JARVIS: It was left to be determined in the  
20 plan of reorganization, and that determination is part of  
21 the releases granted to direct lenders.

22 But the nondebtor insiders including USA Real Estate  
23 Group were specifically excepted out of the releases given  
24 to the direct lenders.

25 THE COURT: For (indiscernible) any reason I

1 didn't bring those particular pleadings in the  
2 (indiscernible).

3 What docket number is the plan?

4 (Colloquy not on the record.)

5 THE COURT: Or maybe it's easier if you point --

6 MS. JARVIS: It --

7 THE COURT: You say --

8 MS. JARVIS: -- would be --

9 THE COURT: Did you refer --

10 MS. JARVIS: It was --

11 THE COURT: -- to it?

12 MS. JARVIS: -- January 8th that it was entered.

13 THE COURT: Okay.

14 (Colloquy not on the record.)

15 MS. CARLYON: Your Honor, I'm passing up a copy of  
16 the plan with the direct-lender --

17 THE COURT: Oh, good.

18 MS. CARLYON: -- releases --

19 THE COURT: Thank you.

20 MS. CARLYON: -- provision now.

21 THE COURT: Okay. All right. Go ahead.

22 MS. JARVIS: Okay. In paragraph 81 of the  
23 confirmation order, it says, "Notwithstanding that," and  
24 there's a whole list of insiders. It's very broad and  
25 includes --

1                   THE COURT: Wait, wait, wait.

2                   MS. JARVIS: -- specifically --

3                   THE COURT: Paragraph --

4                   MS. JARVIS: -- U.S. --

5                   THE COURT: -- 81.

6                   MS. CARLYON: Your Honor, I'm sorry.

7                   MS. JARVIS: Paragraphs --

8                   MS. CARLYON: What --

9                   MS. JARVIS: Oh. Oh, no. It's not in the plan.

10                  It's in the confirmation order that I'm now citing to, so --

11                  MS. CARLYON: And, unfortunately, your Honor, I

12                  didn't have an extra copy of that with me.

13                  MS. JARVIS: Yeah. And --

14                  MS. CARLYON: But there was --

15                  THE COURT: Oh, so you don't have that here.

16                  Okay.

17                  MS. CARLYON: Right. There was a prior mention of

18                  the scope of releases under the plan. I did happen to have

19                  that, so I passed it up.

20                  THE COURT: That's all right. I've got the

21                  findings of fact. Okay. 88, you said?

22                  MS. JARVIS: It's 81, paragraph 81.

23                  THE COURT: Whoops, that's the findings. Okay.

24                  MS. JARVIS: It's I think the next to the last

25                  paragraph.

1                   THE COURT: Okay. Now I'm with you.

2                   MS. JARVIS: Okay. In paragraph 81, it says,  
3 "That notwithstanding that" -- and then there is a whole  
4 list of insiders -- "including USA Commercial Real Estate  
5 Group have some connection with the debtors or the debtor's  
6 estate.

7                   And notwithstanding anything in the plan to the  
8 contrary or which could be construed to the contrary,  
9 nothing in the plan nor this confirmation order shall be  
10 construed as providing a release of any claims or causes of  
11 action against the insiders, including USA Commercial Real  
12 Estate Group."

13                  And if you turn to the plan, your Honor, if you'd turn  
14 to the plan on -- actually, I think you have -- if you turn  
15 on page 51 of the copy that was handed up to you --

16                  THE COURT: Oh.

17                  MS. JARVIS: -- by Ms. Carlyon --

18                  THE COURT: Okay.

19                  MS. JARVIS: -- it's in paragraph -- it's  
20 Article 4(b)(1)(A) where it talks about the release given to  
21 the direct lenders, so USA Commercial Mortgage, all the  
22 nondebtor insiders, are excepted from that release.

23                  THE COURT: This is page 75 --

24                  MS. JARVIS: No.

25                  THE COURT: -- the 207 --

1 MS. JARVIS: Yeah. Turn back --  
2 THE COURT: -- of the joint?  
3 MS. JARVIS: -- to page 51.  
4 THE COURT: 51. Okay. Oh, release. I have it.  
5 MS. JARVIS: Um-h'm.  
6 THE COURT: Okay. Releases all claims.  
7 MS. JARVIS: This is the provision which  
8 acknowledges that it's not property of the estate because it  
9 releases the claims against direct lenders, including, but  
10 not limited to surcharge, recharacterization of  
11 direct-lender loans.  
12 So this is the provision that would acknowledge that  
13 it's not property of the estate, but it only extends to the  
14 direct lenders receiving a release.  
15 The insiders were specifically excepted out of that,  
16 and so we --  
17 THE COURT: So the issue as whether or not it's  
18 property of the estate is still open --  
19 MS. JARVIS: Exactly.  
20 THE COURT: -- as to the insiders.  
21 MS. JARVIS: Right. There is no concession to  
22 that, and we have specifically provided that the nondebtor  
23 insider claims are subordinated and are not to be paid until  
24 all their claims in the estate are to be paid.  
25 And we contend that this claim -- and by the way,

1 USA Real Estate Group has filed claims for these amounts in  
2 this estate, and those claims are subject to subordination  
3 and cannot be paid until --

4 THE COURT: So they have filed claims on behalf as  
5 direct lenders?

6 MS. JARVIS: That's my understanding, your Honor,  
7 yes.

8 MR. SYLVESTER: Your Honor --

9 (Colloquy not on the record.)

10 MR. SYLVESTER: -- (indiscernible).

11 THE COURT: Okay.

12 MS. JARVIS: And even if they didn't, your Honor,  
13 it wouldn't matter because it's still the claims that they  
14 have are subordinated. They do not receive --

15 THE COURT: So --

16 MS. JARVIS: -- this release.

17 THE COURT: But what theory would you have to say  
18 that the money from the direct lender is property of the  
19 estate?

20 And we're talking here -- forget all the defenses,  
21 et cetera. I mean, the analogy would be they had a bank  
22 account someplace else, and, perhaps, you'd have a right to  
23 attach it, and, perhaps you'd have a right to -- or,  
24 perhaps, you'd have a right to attach it.

25 And the other idea would be if they were a member of

1 the fund, clearly, you would have the right to offset that  
2 because they were fund members, and their moneys trickled  
3 down.

4 But with direct lenders, what would the theory be to  
5 do? That those funds would be property of the estate. Now,  
6 as against everybody else, that's --

7 MS. JARVIS: Yeah. That's not --

8 THE COURT: -- not fair game --

9 MS. JARVIS: That's --

10 THE COURT: -- anymore.

11 MS. JARVIS: That's a done deal.

12 THE COURT: That's been resolved.

13 MS. JARVIS: Right. Well, your Honor, one of the  
14 -- I mean, the main issue that we resolved in the plan was  
15 this issue of recharacterization because there had been  
16 substantial commingling of the funds.

17 And, in fact, the commingling was done by the very  
18 parties that are in here that control this entity that are  
19 now asking to be paid, you know, ahead of all the other  
20 legitimate claims in this estate, so that, you know, is a  
21 theory that is still open and very applicable to this.

22 There also are open issues --

23 THE COURT: Of course, the problem is the money  
24 we've collected postpetition clearly was segregated because  
25 Mr. Allison was involved.

1 MS. JARVIS: Right. But it doesn't, for instance,  
2 you know, solve the issue with respect to recharacterizing  
3 the loan itself as one that shouldn't be treated as a  
4 direct-lender loan.

5 It should be treated as, you know, a unsecured  
6 obligation of this debtor because of the commingling that  
7 went on prior to this bankruptcy being filed.

8 In addition, we have, you know, recoupment, other, you  
9 know, surcharge, you know, claims that we could make, and we  
10 haven't settled those. We haven't said --

11 THE COURT: Well, I --

12 MS. JARVIS: -- we aren't --

13 THE COURT: -- certainly --

14 MS. JARVIS: -- going to try to recoup additional  
15 amounts from them.

16 THE COURT: I certainly understand recoupment.  
17 You know, netting is different because netting is -- the  
18 point is they overpaid on those particular loans.

19 Oh, but I guess your point is there may be other loans  
20 that they were overpaid on that we don't even know about,  
21 yet.

22 MS. JARVIS: Well, there may be other claims. I  
23 mean, we now know of one claim that we have, you know,  
24 coming out of the Diversified estate because they now have  
25 just received \$430,000 that, you know, we contend belongs

1 first and foremost to Diversified.

2 And, of course, that's, you know, a significant issue  
3 because this is a company that has no business, no  
4 employees. And, therefore, if money is paid over to this  
5 company, it's going to be difficult to get any money back.

6 We already have outstanding, your Honor, over  
7 \$110,000,000 in claims against -- you know, the IP entities  
8 have not collected a dime, and this is one of the affiliates  
9 of IP.

10 And, therefore, there are significant claims that we  
11 have that we want to reserve our rights to recoup or offset  
12 against these moneys.

13 THE COURT: And, of course, now, could you recoup  
14 if it wasn't property of the estate?

15 MS. JARVIS: In certain -- yeah. I mean, you can  
16 in the instance where you have a claim that you are allowed  
17 to recoup. I mean, recoupment is just determining what the  
18 claim is.

19 In other words, the property of the estate doesn't come  
20 out until after you determine the recoupment claim. I mean,  
21 that's essentially what, you know, the Court already has  
22 ruled, so it just determines what's owed, so we recoup  
23 first, and then you determine what would go, you know, to a  
24 direct lender.

25 THE COURT: Okay.

1 MS. JARVIS: You know, alternatively,  
2 your Honor -- and we did, you know, allege this  
3 alternatively just in case the Court ruled that this is not  
4 subordinated -- we have filed a complaint against USA  
5 Real Estate Group. We have filed a motion for a prejudgment  
6 writ of attachment.

7 We believe that we have a good claim for that, and we  
8 would ask that the Court allow that to be heard on its  
9 merits before any funds are disbursed to USA Real Estate  
10 Group, particularly in light of the fact that it appears  
11 that recovery of those funds since this is a company that  
12 does no business, has no employees, and is owned by  
13 Mr. Milanowski and Mr. Hantges that that not be allowed to  
14 be disbursed until we can have that prejudgment writ of  
15 attachment heard if the Court rules that the claim is not  
16 subordinated.

17 THE COURT: Okay. Ms. Freeman.

18 MS. FREEMAN: Susan Freeman, counsel for the  
19 Unsecured Creditors Committee. We joined in the debtor's  
20 objection on this.

21 And I just wanted to emphasize that your Honor is I  
22 believe completely accurate in your analysis with respect to  
23 them having a claim.

24 Their claim is for failure to distribute these funds,  
25 and that claim is certainly subject to setoff and

1 recoupment, and that claim under the plan is subordinated  
2 and gets nothing.

3 To the extent that these are funds that are being held,  
4 they have a claim for wrongful withholding of those funds,  
5 and that is subject to setoff.

6 To the extent that those funds are being held now,  
7 certainly, whenever funds come into the hands of the estate,  
8 the estate can hold on to those, so that it can offset  
9 against them, and so that it can recoup against them.

10 That's part of kind of the underlying analysis of all  
11 of the various holdbacks that we've had, and it's a  
12 fundamental analysis for the entire plan of reorganization  
13 and the basis for holding back the money and allowing it to  
14 be distributed back to all of the unsecured creditors.

15 These are people who are quintessential insiders. And  
16 to the extent that they have claims based upon transactions  
17 that they entered into, they knew where the money went and  
18 how it was being commingled.

19 They knew to the extent that the money that they put in  
20 for direct lenders and that was coming back from borrowers  
21 was being siphoned off and being sent to other places. They  
22 were the ones who were controlling it.

23 To the extent that there are recharacterization claims  
24 that still exist because those were not released against  
25 those insiders, those are very much alive and well and

1 available to be pursued.

2 THE COURT: Okay.

3 MS. FREEMAN: Thank you.

4 MR. SYLVESTER: A couple of issues first. I'm a  
5 bit stunned that counsel would state to your Honor that  
6 USA Commercial Real Estate Group filed proofs of claims for  
7 the funds held. We set forth in the reply that that's not  
8 true.

9 We did file two proof of claims. One was clearly  
10 checked for unremitted principal, and one was clearly  
11 checked as there was an unsecured loan by and between  
12 USA Commercial Real Estate Group and the debtor. We have  
13 not at any point submitted a proof of claim for the funds  
14 that are held in trust.

15 The issue is, ultimately -- and, frankly, it's  
16 difficult with this debtor and this committee because the  
17 defense has changed each and every time we come back to this  
18 Court.

19 The first time we were here, it was simply that, well,  
20 we have claims of setoff. And in opposition or in response  
21 to the claim of setoff, I said you don't have setoff.

22 You can't by operation of the law because you don't  
23 have mutuality of debt, and you cannot set off funds held in  
24 trust because you just simply lack the element of mutuality.

25 They never opposed that. They never came to this Court

1 and said, yes, we do have mutuality because we have the  
2 right to recharacterize this debt because these funds really  
3 are property of this bankruptcy estate.

4 There is nothing in the disclosure statement or the  
5 plan that suggests that they are going to recharacterize  
6 these funds that they hold in trust for the benefit of  
7 Commercial Real Estate Group to property of the estate.

8 There is nothing that would provide fair notice to my  
9 client that that's what the intent of the plan of  
10 reorganization was.

11 And I understand that there is this new argument that  
12 what they really want to do is attempt to set out in the  
13 future some argument that they could recharacterize this  
14 debt.

15 But they haven't given you a scintilla of legal  
16 authority, not a case, not a provision in the plan, nothing,  
17 in fact, not even an assertion that the funds that they hold  
18 are property of this bankruptcy estate.

19 You asked for additional briefing, and their briefing  
20 was, well, you're subordinated, and then if you're not  
21 subordinated we have issues of setoff and recoupment.

22 And you asked Ms. Jarvis very directly how is it  
23 property of the estate, and she started talking about  
24 commingling.

25 But that when you pointed out the fact that

1 postpetition they'd collect this money in the service  
2 agreement, and they can account for that, and that hasn't  
3 been commingled, then there is no response.

4 The resolution of both setoff, recoupment, and whether  
5 this claim has been subordinated begins and ends with  
6 whether or not this is property of the bankruptcy estate  
7 because under subordination if it is not property of the  
8 bankruptcy estate which is what the Nevada law says, which  
9 is what the loan service agreement says, which is what the  
10 Ninth Circuit says, then it cannot be used and cannot be  
11 distributed under the terms of a plan of reorganization by  
12 operation of law. They know that.

13 They haven't come to this Court and said this is why  
14 it's property of the estate. And if they don't do that,  
15 then the Court has to enforce its prior order where they ask  
16 for permission to make these funds available to the direct  
17 lenders and to release those to the direct lenders.

18 They could have gone back and modified the prior  
19 interim distribution orders to carve out USA Commercial  
20 Real Estate Group or they could have put in the plan of  
21 reorganization that while it's true that we acknowledge that  
22 the funds held for the other direct lenders are not property  
23 of the estate we want to focus on and save for a later date  
24 the issue that these are.

25 When you asked counsel how is it that they can be

1 property of the estate, there was no response, and this is  
2 the third time that we are here.

3 I have cited Nevada law, Ninth Circuit law, the loan  
4 service agreement, the Nevada Administrative Code, and it's  
5 not property of the estate.

6 I don't have a claim in this bankruptcy for the  
7 distribution of those funds. I have a claim for damages  
8 that may result of the conversion.

9 But nothing, nothing that this Court could do, frankly,  
10 under a confirmed plan can transmute property that they hold  
11 in trust for the beneficiaries to property of the bankruptcy  
12 estate.

13 They haven't provided you any authority to support that  
14 proposition. And if they cannot, then subordination doesn't  
15 apply. And if they cannot, then setoff doesn't apply.

16 You want to give them a writ? Well, let's come back on  
17 a date when we can entertain whether or not they can get a  
18 writ of attachment on the funds that they hold in trust, and  
19 I will come back, and I'll argue another day on that issue.

20 But the order of this Court should be enforced, and,  
21 frankly, setoff doesn't apply, and the terms of the  
22 confirmed plan don't apply.

23 Thank you.

24 THE COURT: Okay. All right. Thank you.

25 I'm going to deny the motion because we don't have a

1 finding at this stage that it, indeed, is their property as  
2 opposed to property of the estate.

3 Now, when I say I deny it, I'm viewing it as a summary  
4 judgment, in essence. The point being we don't know that  
5 this is not property of the estate.

6 I think you may have some problems with that analysis  
7 because you don't have because -- because Mr. Allison has  
8 done what he's supposed to do, those funds haven't been  
9 commingled.

10 But by the same time, I'm not willing to try and think  
11 through all the ways in which the commingling effectuates  
12 the whole process.

13 I understand it's extremely frustrating for you,  
14 extremely frustrating for me, to be in a position where  
15 you're going to turn over \$180,000 to the very wrongdoers.

16 But the problem is, you know, you've got to keep your  
17 legal analysis straight or we're all on a very slippery  
18 slope here.

19 At least, we now have a plan which the plan says all  
20 other direct lenders is not property of the estate, but  
21 you're right.

22 You have reserved as against them the issue of whether  
23 or not it's property of the estate, and you're absolutely  
24 right.

25 Along the way when I was ready to suggest it wasn't

1 property of the estate, you all said, no, do not make that  
2 determination.

3 And I think in retrospect rightfully so because the  
4 commingling issues have become much broader than I think we  
5 all thought along the way.

6 But if it was property of the estate, the next step is  
7 what happens -- if it wasn't. Excuse me. If it wasn't  
8 property of the estate, what's the next step that happens,  
9 and I do think that you then get thrown into the claim  
10 process.

11 What's the remedy? Well, the remedy isn't just to  
12 distribute. The remedy is to file a complaint or a claim  
13 for -- and it would be a claim against the trustee. It  
14 wouldn't be a prepetition claim that's barred or be a  
15 postpetition claim.

16 It would be a complaint for a turnover. In which case,  
17 I think the defenses may then arise, but you wouldn't reach  
18 that result until you knew whether or not it was property of  
19 the estate.

20 If I determine it was property of the estate, I guess  
21 the point is I still couldn't order the distribution of the  
22 funds. You'd still have to bring a complaint. You'd have  
23 adjudication. You'd then bring a complaint.

24 If you want to move up the attachment hearing, so we  
25 end the ambiguity at least on that legal theory, we

1 certainly can do that.

2 (Colloquy not on the record.)

3 MR. SYLVESTER: I sort of can't speak to the  
4 attachment theory, but I would request that this Court then  
5 treat this as a --

6 THE COURT RECORDER: I'm sorry, Counsel.

7 MR. SYLVESTER: I'm sorry.

8 THE COURT RECORDER: (Indiscernible).

9 Thank you.

10 MR. SYLVESTER: Again, Jeff Sylvester. I would  
11 request that this Court then treat this as a contested  
12 matter and allow us to treat it as an adversary if you will  
13 and allow me to do some discovery if necessary and set it  
14 for an evidentiary hearing, so we can have that issue  
15 resolved.

16 THE COURT: Okay. Now, I am not going to -- you  
17 know, they may say you've got to file a complaint. I'm not  
18 going to rule on whether or not you have to do it by means  
19 of adversary as opposed to a contested proceeding.

20 MR. SYLVESTER: Well, that's --

21 THE COURT: But you're right.

22 MR. SYLVESTER: -- what I'm asking.

23 THE COURT: Whatever it will require, it's going  
24 to require -- that issue is an evidentiary matter.

25 MS. JARVIS: And, your Honor, we would be amenable

1 and think it makes sense, actually, to have the motion for a  
2 prejudgment writ of attachment done on an expedited basis.  
3 We would just need probably some expedited discovery before  
4 then as well.

5 THE COURT: Right. Because the point is that  
6 would moot the issue if I grant the attachment.

7 MS. JARVIS: Exactly, your Honor.

8 (Colloquy not on the record.)

9 THE COURT: Oh, I need a calendar, Eileen.

10 (Colloquy not on the record.)

11 MS. JARVIS: Your Honor, I think it's currently  
12 set for March 1st. I think our next hearing date is  
13 February 15th.

14 THE COURT: Oh, I thought you said March 31st.  
15 Sorry. Does March --

16 (Colloquy not on the record.)

17 THE COURT: Well, when would you be making the  
18 next distributions, anyway?

19 (Colloquy not on the record.)

20 MR. SYLVESTER: To my client?

21 (Colloquy not on the record.)

22 THE COURT: No. When is Mr. Allison -- when were  
23 the next distributions being made?

24 (Colloquy not on the record.)

25 MS. FREEMAN: They're planned for the end of this

1 month, your Honor.

2 THE COURT: The end of this --

3 (Colloquy not on the record.)

4 THE COURT: The end of January?

5 (Colloquy not on the record.)

6 THE COURT: Oh, okay.

7 MS. JARVIS: Yeah. Okay. The January  
8 distributions will be next week, then the February  
9 distributions would be at the end of February.

10 MR. SYLVESTER: But I guess that begs the  
11 question, your Honor, I mean, for how long and what period  
12 of time is this debtor going to claim an interest in the  
13 ongoing distributions. Does it end at --

14 THE COURT: No.

15 MR. SYLVESTER: -- the confirmation?

16 THE COURT: No. We have to resolve this. You're  
17 right. I'm not disagreeing with you.

18 MR. SYLVESTER: Not today, necessarily.

19 THE COURT: Right. Just not today. You're right.  
20 Well, do you want to wait 'til March 1st?

21 (Colloquy not on the record.)

22 THE COURT: I think 30 days would --

23 MS. McPHERSON: The --

24 THE COURT: I certainly would be --

25 MS. McPHERSON: Your Honor --

1                   THE COURT: Certainly, the motion should be  
2 delayed for 30 days.

3                   MS. McPHERSON: Your Honor, on March 2nd is  
4 another motion.

5                   THE COURT: So do you want to do it on March 2nd?

6                   MS. McPHERSON: Well, it would tie in with the  
7 other motion for a writ.

8                   (Colloquy not on the record.)

9                   THE COURT: Yeah.

10                  MS. McPHERSON: So you could hear them together.

11                  (Colloquy not on the record.)

12                  THE COURT: Okay. So we'll do it March 2nd at  
13 9:30 will be the hearing on the motion for a writ of  
14 attachment.

15                  MS. JARVIS: Thank you, your Honor.

16                  MR. SYLVESTER: Very good, your Honor.

17                  THE COURT: And in the meantime, if you want to  
18 see if they want to do a discovery plan. If they disagree  
19 and say it has to be done by an adversary, we can address  
20 that.

21                  MR. SYLVESTER: Very good.

22                  THE COURT: Okay.

23                  MR. SYLVESTER: Thank you, your Honor.

24                  THE COURT: I mean, because they hadn't raised  
25 that issue before, I appreciate that. Okay.

1           Thank you.

2           I did have a calendar, Eileen -- I apologize -- or did  
3 you give me two?

4           THE CLERK: Well --

5           THE COURT: Wait. Oh, this one right here? No.

6           THE CLERK: Yeah.

7           THE COURT: Oh, I think this goes back in this  
8 pile, Eileen. Okay.

9           And do we have anything besides the -- oh, we've got  
10 the Western Life. Let's take a short recess, and then we'll  
11 do Western Life and then the protective order, and then  
12 we'll go to the Tree Moss issues.

13           MS. CARLYON: We also have the Standard objection  
14 to claim, your Honor.

15           THE COURT: Oh, Standard. Right.

16           Thank you.

17           MS. CARLYON: Thank you.

18           THE CLERK: All rise.

19           (Recess at 11:06:40 a.m.)

20           (Court reconvened at 11:22:39 a.m.)

21           THE COURT: Be seated.

22           (Colloquy not on the record.)

23           THE COURT: Okay. On the first Western Insurance  
24 (sic).

25           Did I misspeak the name?

1 MS. JARVIS: Which one is this?

2 MR. LEATHAM: No. That is correct, your Honor.

3 THE COURT: Okay.

4 MR. LEATHAM: Nile Leatham --

5 (Colloquy not on the record.)

6 MR. LEATHAM: -- for Western United Life  
7 Assurance. Michael Anglin from Fulbright & Jaworski is  
8 here. He will be making the argument --

9 THE COURT: Okay.

10 MR. LEATHAM: -- on behalf of our client.

11 THE COURT: Well, let me just because it's late.  
12 I've got a noon conference call. I don't want to have to  
13 bring you back. Let me just tell you my inclination.

14 The stay is going to end within two weeks because,  
15 hopefully, the plan will go effective, so my inclination was  
16 to deny as a preliminary matter and continue to a final  
17 hearing over for 30 days, so with that in mind.

18 And I understand your arguments, but I do think there's  
19 a Ninth Circuit case that indicates that, you know, even if  
20 they've got a junior interest that that's property of the  
21 estate.

22 MR. ANGLIN: Your Honor, Mike Anglin for the  
23 record. If the Court does rule that way, we will certainly  
24 respect that order, and there is no question about that.

25 If the Court would indulge me just a short presentation

1 of our position, I think I'd rather be able to tell my  
2 client I --

3 THE COURT: Okay.

4 MR. ANGLIN: -- at least --

5 THE COURT: Sure.

6 MR. ANGLIN: -- explained it if you don't mind,  
7 but it will not be long, your Honor.

8 THE COURT: Okay. Go ahead.

9 MR. ANGLIN: Oh --

10 MS. JARVIS: Oh --

11 MR. ANGLIN: -- I'm sorry.

12 MS. JARVIS: -- did you want us --

13 THE COURT: Because it's your motion.

14 MS. JARVIS: It's our motion. Right.

15 THE COURT: Oh, it was your motion.

16 MS. JARVIS: Yes.

17 THE COURT: I'm sorry.

18 MS. JARVIS: It's our motion.

19 THE COURT: It was a motion to enforce. I  
20 apologize. I had it converse. I was thinking you had filed  
21 your motion to lift stay. You hadn't.

22 MS. JARVIS: Your Honor, I think as, obviously,  
23 your Honor has read the papers and I think as you understand  
24 Western United has a first lien on certain Montgomery County  
25 property.

1           And USA Commercial Mortgage arranged a loan for  
2        10.475 million dollars that has a second lien on this same  
3        property as well as a first lien on another piece of  
4        property.

5           It's important to note the total amount owed at this  
6        point on the USA Commercial Mortgage loan is there is  
7        10.475 million still owed on the principal. There's almost  
8        \$1,000,000 in interest owed.

9           There are late fees of 23-, about almost \$24,000, and  
10      exit fees of 262, approximately, thousand dollars. That's  
11      important because this ties also into the Compass sale as  
12      well.

13          First Trust Deed has a 4.77 interest in the loan.  
14          Diversified Trust Deed has a 5.96-percent interest in the  
15        loan. USA Commercial Mortgage has an interest in the late  
16        fees and the exit fees.

17          Those are being sold to Compass. And if there is some  
18        impairment of those or if they are not collected or waived,  
19        then this could result in a purchase-price adjustment on the  
20        Compass loan, so it is very important to the debtors that  
21        this not go forward.

22          The Texas Court --

23           THE COURT: Is this a loan that was then sold to  
24        Compass or is this one they --

25           MS. JARVIS: No.

1                   THE COURT: -- excised out?

2                   MS. JARVIS: Well, the First Trust Deed portion of  
3 it is being sold --

4                   THE COURT: Okay.

5                   MS. JARVIS: -- to Compass, and the servicing  
6 rights are being sold --

7                   THE COURT: Um-h'm.

8                   MS. JARVIS: -- to Compass, and the Diversified  
9 Trust Deed Fund interest is being serviced by Compass as  
10 part of this.

11                  And, of course, this is critical because even as  
12 your Honor pointed out while we're talking about maybe a few  
13 weeks where there may not be a stay we, the debtors, are not  
14 in a position to adequately protect the interests of  
15 USA Commercial Mortgage, Diversified, and First Trust Deed  
16 at this point in time.

17                  But Compass when they take over, you know, who is  
18 well-funded and in a different position would be able to and  
19 should be given the time to adequately protect its own and  
20 the other direct lenders' interests in this situation.

21                  The Texas Court based on a single-asset real estate  
22 designation -- so there are those special rules that allow  
23 relief from the stay -- has allowed this matter to be  
24 noticed up for foreclosure.

25                  My understanding is that it's being heard today on a

1 final hearing as to whether that would be allowed to go  
2 forward on February 6th.

3 Now, we, the debtors, gave notice to Western United as  
4 early as August 15th of the stay and have again reminded  
5 them that the stay is in effect, so there is no emergency  
6 meaning they could have sought relief from stay for months  
7 and months if they had wanted to.

8 They did not seek relief from the stay. They just went  
9 forward and proceeded forcing us now to come in then to ask  
10 for the stay to be enforced.

11 There is no question that under Ninth Circuit law,  
12 your Honor, that junior liens are property of the estate.  
13 They are protected by the stay, and, therefore, they are not  
14 entitled to foreclose out those properties or those  
15 interests absent getting relief from the stay.

16 I think as your Honor is aware that the Bibo case of  
17 the Ninth Circuit BAP which actually interpreted the Bialac  
18 case which is a Ninth Circuit case itself in interpreting  
19 that property of the estate is being very broad.

20 And the Bibo case in looking at the reasoning of the  
21 Ninth Circuit Bialac case said junior liens are definitely  
22 property of the estate. They are protected by the stay.

23 That was confirmed in the Cogar case and, most  
24 recently, in the A Partners case in the Eastern District of  
25 California, so this is the law in this circuit.

1           And while there may be other circuits that decide  
2 differently, this Court is bound by our own circuit's law  
3 and not by the law of other circuits.

4           We have asked the Court, you know, for an order  
5 enforcing the stay. If they want to seek relief from stay,  
6 they need to do so.

7           But we are entitled to have that hearing and the  
8 protections that the stay allows us to be able to have this  
9 Court determine whether relief from the stay is appropriate  
10 and not just allow them to go forward and try to effect and  
11 foreclose out our interests.

12           THE COURT: Okay.

13           MS. JARVIS: So we would ask the Court to enforce  
14 the stay.

15           MS. CARLYON: Your Honor, as First Trust Deed Fund  
16 is a named lender on the second deed of trust, we also filed  
17 a joinder in the debtor's motion to enforce.

18           As far as the procedure going forward, I don't know if  
19 a preliminary and final hearing is appropriate since this is  
20 a motion to enforce the stay.

21           But it may be appropriate if we needed to set a  
22 continued hearing, especially, given the number of matters  
23 we have on calendar today simply on the issue of whether the  
24 postpetition notice of sale which was filed by this creditor  
25 knowing that this bankruptcy estate had an interest in the

1 second itself violated the stay and is, therefore, a void  
2 act because it seems to me that unless the creditor agrees  
3 that it's going to repost that notice following the stay  
4 lifting in this case that issue does remain squarely in  
5 play.

6 THE COURT: Okay. All right. Opposition.

7 THE CLERK: Could you spell your last name for me?

8 MR. ANGLIN: Yes. A-n -- excuse me. A-n-g-l-i-n.

9 Your Honor, obviously, this is a fairly interesting  
10 question I think, and I have never seen in 31 years of  
11 practicing bankruptcy law this particular question brought  
12 to a Court.

13 THE COURT: Well, I just --

14 MR. ANGLIN: And --

15 THE COURT: -- thought it was the law in the  
16 Ninth Circuit. I just thought there was no question that  
17 the Bibo and Bialac case said if there was a -- no. As to  
18 USA Commercial Mortgage, that's a little tangential. But as  
19 to the two funds, they have an interest in the deed of  
20 trust.

21 MR. ANGLIN: That's right, your Honor, but the --

22 THE COURT: So why aren't they protected by the  
23 stay? It's property of the estate.

24 MR. ANGLIN: It's a question of 362 and a question  
25 of 541. In the United States Supreme Court in Whiting

1 Pools, it tells us that lien interests are not property of  
2 the estate, but no date.

3 THE COURT: Well, that's a footnote. That  
4 wasn't --

5 MR. ANGLIN: That's true. It wasn't. It was  
6 dicta, but it was an interesting explanation for why the  
7 Supreme Court thought that a debtor's lien interest if it  
8 was a junior lien interest in property of a third party was  
9 not --

10 THE COURT: Why didn't you just bring a motion for  
11 relief from the stay?

12 MR. ANGLIN: Well, your Honor, in the  
13 Fifth Circuit, that would never be done. In the Fourth and  
14 Seventh Circuits, that would never be done.

15 THE COURT: Well, that's great, but you're not in  
16 the Fifth or Fourth Circuits.

17 MR. ANGLIN: So wouldn't it be important, then, to  
18 understand why -- Bibo and Bialac and A Partners, what were  
19 those Courts driving at?

20 And is there any difference between those decisions  
21 which may warrant such a decision in the Ninth Circuit not  
22 be an appropriate decision when the property is located  
23 outside the Ninth Circuit or say outside of California?  
24 Foreclosure laws are state laws.

25 THE COURT: I mean, what if, for example, you had

1 a deed of trust that was owed \$1. Okay?

2 MR. ANGLIN: Okay.

3 THE COURT: The property was worth \$5,000,000, and  
4 you had a debtor that owned 90 percent of a second.

5 MR. ANGLIN: Your Honor, in Texas --

6 THE COURT: Under your theory, they're not  
7 protected by the stay.

8 MR. ANGLIN: Your Honor, in Texas, that debtor  
9 would show up at the foreclosure and bid \$2 and own the  
10 property.

11 THE COURT: But where do they get the money to do  
12 that? They'd have to borrow.

13 MR. ANGLIN: Well, your Honor, I'm just saying  
14 that in Texas the second lienholders have no rights like  
15 they do in California that prompted the Bibo and Bialac  
16 decisions and A Partners. Even in the words lifted from the  
17 cases and put in --

18 THE COURT: Well, the Ninth Circuit, the same  
19 thing happens. The second can bid at the sale.

20 MR. ANGLIN: That's true. They also have the  
21 right of redemption and reinstatement, but those rights are  
22 not existent in Texas.

23 THE COURT: No. There is no right of redemption  
24 and reinstatement in California or Nevada.

25 MR. ANGLIN: Well, the cases that were quoted and

1 the language planted into the motion that we're hearing  
2 today says that it is. It highlights the redemption and  
3 reinstatement rights.

4 In fact, the fears of those Courts were that the rights  
5 of redemption and reinstatement were what were being taken  
6 away, in other words, the package of rights associated with  
7 the junior lien interest that was being taken away by the  
8 foreclosure. Those rights that they were concerned about in  
9 those cases --

10 THE COURT: How --

11 MR. ANGLIN: -- literally --

12 THE COURT: I don't --

13 MR. ANGLIN: -- don't exist --

14 THE COURT: -- understand --

15 MR. ANGLIN: -- in Texas.

16 THE COURT: -- how in the world you can say a  
17 junior lien interest isn't property of the estate. How in  
18 the world can you possibly say that? You can certainly  
19 borrow on it, right?

20 MR. ANGLIN: You can -- excuse me?

21 THE COURT: Borrow on it. For example, if I have  
22 a two-percent interest in a second deed of trust, I can take  
23 that to some lender and get money on it, right --

24 MR. ANGLIN: You would be --

25 THE COURT: -- if it's worth anything?

1 MR. ANGLIN: You would be --

2 THE COURT: It's a property interest.

3 MR. ANGLIN: You would be pledging the note --

4 THE COURT: Right.

5 MR. ANGLIN: -- your Honor.

6 THE COURT: Right.

7 MR. ANGLIN: There's no doubt that the note itself  
8 is property of this estate --

9 THE COURT: Right.

10 MR. ANGLIN: -- and that that lien position that's  
11 granted to secure that note has rights associated with it  
12 which it could also be property rights of the estate. I'm  
13 not arguing that it's not.

14 What I'm saying is that we are not foreclosing on the  
15 note, and we're not frustrating or in any way impinging upon  
16 the rights associated with --

17 THE COURT: If you foreclose --

18 MR. ANGLIN: -- that note.

19 THE COURT: -- the second's wiped out, correct?

20 MR. ANGLIN: That's by state law. That's not --

21 THE COURT: Okay. So it's wiped out.

22 MR. ANGLIN: Yes. It is --

23 THE COURT: The property interest --

24 MR. ANGLIN: -- wiped out.

25 THE COURT: -- is gone.

1 MR. ANGLIN: That is strictly foreclosed.

2 THE COURT: Okay.

3 MR. ANGLIN: So the --

4 THE COURT: So how can you tell me you're not  
5 wiping out a property interest?

6 MR. ANGLIN: Because what we're doing is we're  
7 simply using our right that Judge Clark in Houston I assume  
8 today will say that we can go forward with to take legal  
9 title to the property, to take legal and equitable title to  
10 the property, if we are the --

11 THE COURT: Well, but the issues of fact --

12 MR. ANGLIN: -- successful bidder.

13 THE COURT: The issues are different in front of  
14 him. The issue is as between you and the debtor is there  
15 adequate protection like -- well, what's the property worth?

16 MR. ANGLIN: We don't know.

17 THE COURT: How can you --

18 MR. ANGLIN: It's been --

19 THE COURT: How can you file your motion and not  
20 know?

21 MR. ANGLIN: File a motion to --

22 THE COURT: And in --

23 MR. ANGLIN: -- lift the stay?

24 THE COURT: And in front of Judge Clark.

25 MR. ANGLIN: Well, there has been -- well, we did

1 it because --

2 THE COURT: Oh, because it's under --

3 MR. ANGLIN: -- it's a single asset --

4 THE COURT: -- the single-asset --

5 MR. ANGLIN: -- a single-asset --

6 THE COURT: -- real estate.

7 MR. ANGLIN: -- real estate.

8 THE COURT: Okay.

9 MR. ANGLIN: We have been delinquent for  
10 two-and-a-half years. We have not received a single  
11 payment. Judge Clark is tired of it. We are tired of it,  
12 and the time has come --

13 THE COURT: But the issues --

14 MR. ANGLIN: -- to foreclose.

15 THE COURT: -- are totally different. The issue  
16 is as between you and the first can you foreclose, right?

17 MR. ANGLIN: You're right.

18 THE COURT: Okay.

19 MR. ANGLIN: Well, and these debtors actually came  
20 to Houston and asked for the --

21 THE COURT: I mean --

22 MR. ANGLIN: -- very same --

23 THE COURT: Excuse me. You and the owners.

24 Excuse me. The debtor in bankruptcy there is the owner,  
25 right?

1 MR. ANGLIN: The debtor is the owner.

2 THE COURT: Right. Because the --

3 MR. ANGLIN: Yes.

4 THE COURT: Between you as the first and the  
5 owner, those are the issues.

6 MR. ANGLIN: That's right.

7 THE COURT: Okay. So he's not determining whether  
8 or not there's any rights in the property as to the  
9 second --

10 MR. ANGLIN: Well --

11 THE COURT: -- nor can he.

12 MR. ANGLIN: Judge Letitia Clark, she was asked by  
13 USA, the First and Diversified, to make that determination,  
14 your Honor.

15 They sent lawyers to Houston to argue that in front of  
16 her, and she did not give credence to that argument and did  
17 not enforce the stay as they requested, so they came here.

18 (Colloquy not on the record.)

19 THE COURT: But you never filed a motion to lift  
20 stay.

21 MR. ANGLIN: In this court, we have not,  
22 your Honor.

23 THE COURT: Okay.

24 MR. ANGLIN: It was our understanding that no stay  
25 existed to frustrate the first lienholder's foreclosure --

1                   THE COURT: Why in the world --

2                   MR. ANGLIN: -- just as the Fourth is --

3                   THE COURT: -- would you want to do that when you  
4 know the law in the Ninth Circuit is a sale conducted in  
5 violation of a stay is void?

6                   MR. ANGLIN: Well, the law in the Ninth Circuit if  
7 it's the Bibo case, it's a vacated --

8                   THE COURT: No.

9                   MR. ANGLIN: -- decision --

10                  THE COURT: The other cases --

11                  MR. ANGLIN: -- of the BAP.

12                  THE COURT: -- that say that acts conducted in  
13 violation of the stay are void.

14                  MR. ANGLIN: Well, that's true. We wouldn't want  
15 to have -- if we thought that it was in violation of the  
16 stay, we would not foreclose.

17                  THE COURT: But why risk it?

18                  MR. ANGLIN: Well, that's what I guess the purpose  
19 of this hearing is. If the stay is in place, and this Court  
20 declares that until the note is sold, then we will not  
21 foreclose.

22                  THE COURT: Well, we still don't know. Did you  
23 intend to republish?

24                  MR. ANGLIN: Well, in Texas, you can only  
25 foreclose on the first Tuesday of a month. We would have

1       missed the February 6th opportunity, so we would be required  
2       to repost, anyway, in February for any March foreclosure.

3                 THE COURT: Okay.

4                 MR. ANGLIN: If the Court would grant us this  
5       because of the pending sale and because of the extraordinary  
6       circumstances, the fact that this may be over very shortly,  
7       we would ask the Court to at least permit us to post in  
8       February for a March foreclosure subject to the stay being  
9       clearly lifted and permitting a March foreclosure.

10                THE COURT: Okay.

11                MR. ANGLIN: Would that be acceptable to the Court  
12       or --

13                THE COURT: If you had stipulated with counsel,  
14       that might have been the answer, but it's too late now.

15                MR. ANGLIN: Okay. Thank you, your Honor.

16                THE COURT: Okay. I'm going to grant the debtor's  
17       motion. I believe that the Ninth Circuit law is clear that  
18       the junior lien held by the funds is property of the estate.  
19       And, therefore, in order to foreclose on that interest, they  
20       had to file a motion for relief from the stay.

21                Now, it probably wouldn't have been a hard case to do  
22       since there's such a minor interest held by them and  
23       depending upon the values, but they didn't do it. They  
24       didn't follow the rules.

25                I won't make a decision as to whether or not

1 USA Commercial has property of the estate. That seems a  
2 little more tangential to me, the right to exit fees. I  
3 won't go that far. But as to the two funds, it is property  
4 of the estate.

5 I don't make any -- well, I find that it's property of  
6 the estate. So whether or not they can now proceed even  
7 when the -- what the effect of the prior notice was, I don't  
8 rule on. Okay.

9 Thank you.

10 (Thereupon, the portion requested to be transcribed  
11 was concluded at 11:37:45 a.m.)

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 I certify that the foregoing is a correct transcript  
2 from the electronic sound recording of the proceedings in  
3 the above-entitled matter.

4

5

6 /s/ Lisa L. Cline

03/18/07

7 Lisa L. Cline, Transcriptionist

\_\_\_\_\_  
Date

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25